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11 WORKERS OF AMERICA, AFL-CIO,

12 UNITED STATES OF AMERICA
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14 REGION 21

15 PURPLE COMMUNICATIONS,

16 Employer,

17 and

18 COMMUNICATIONS WORKERS OF
19 AMERICA, AFL-CIO,

20 Charging Party/Petitioner.

Case Nos.: 21-CA-095151; 21-RC-091531;
21-RC-091584

**CHARGING PARTY'S REPLY BRIEF
TO EXCEPTIONS OF RESPONDENT**

TABLE OF CONTENTS

Page

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I.	INTRODUCTION	1
II.	SOME GENERAL COMMENTS ON ISSUES RAISED BY THE EXCEPTIONS	1
III.	PURPLE’S OPERATIONS	2
A.	THE NATURE OF PURPLE’S VRS SERVICES	4
B.	THE THREE DIFFERENT TYPES OF COMMUNICATION SYSTEMS USED BY THE INTERPRETERS	4
C.	THE USE OF PURPLE’S COMMUNICATIONS EQUIPMENT.	6
D.	PURPLE’S ELECTRONIC COMMUNICATIONS POLICY APPLIES TO ALL OF THESE SYSTEMS:.....	7
E.	THE USE OF EMAIL FOR WORK RELATED PURPOSES	8
F.	PURPLE’S BUSINESS MODEL CREATES PERIODS OF TIME WHEN VIDEO INTERPRETERS ARE NOT ENGAGED IN PRODUCTION, WHICH IS RESPONDING TO CALLS AND INTEPRETING USING PURPLE’S COMMUNICATION SYSTEMS.....	10
IV.	ARGUMENT	13
A.	ELECTRONIC COMMUNICATIONS SYSTEMS MAINTAINED BY PURPLE SHOULD BE AVAILABLE TO EMPLOYEES TO COMMUNICATE FOR PROTECTED CONCERTED ACTIVITY AND UNION ACTIVITY DURING WORK AND NONWORK TIME.	13
1.	Purple Makes Pro Forma Arguments Which Have Already Been Rejected By The Board In Purple Communications I.....	13
B.	NOTHING IN THE BOARD’S DECISION INTERFERES WITH THE EMPLOYER’S RIGHTS PROTECTED BY SECTION 8 (C) IN THE FIRST AMENDMENT.	15
C.	PURPLE ARGUES THAT THE BOARD’S RULES REGARDING EMPLOYER DISTRIBUTION OF LITERATURE SHOULD APPLY.....	16

TABLE OF CONTENTS (cont'd)

	<u>Page</u>
D. PURPLE OBJECTS TO THE RETROACTIVE NATURE OF THE REMEDY.....	16
E. SUMMARY OF ARGUMENT	17
V. THE BOARD’S DECISION IS TOO NARROW.....	17
A. THE BOARD HAS REPEATEDLY FOUND THAT USE OF EMAIL DURING WORK HOURS IS PROTECTED.....	19
VI. THE REGISTER-GUARD RULE REGARDING DISCRIMINATION SHOULD BE DISCARDED.	22
VII. CONCLUSION.....	23

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

	<u>Page</u>
Federal Cases	
<i>Citizens United v. FCC</i> , 558 U.S. 310 (2010).....	23
NLRB Cases	
<i>California Institute of Technology</i> , 360 NLRB No. 63 (2014)	20
<i>Conagra Foods, Inc.</i> , 361 NLRB No. 113 (2014)	19, 21
<i>E. I. Du Pont De Nemours & Co.</i> , 311 NLRB 893 (1993)	19
<i>Grand Canyon Education, Inc.</i> , 362 NLRB No. 13 (2015)	21
<i>Hitachi Capital America Corp</i> , 361 NLRB No. 19 (2014)	21
<i>Purple Communications, Inc.</i> , 361 NLRB No. 43	6
<i>Register-Guard</i> , 351 NLRB 1110 (2007)	8
<i>Timekeeping Systems, Inc.</i> , 323 NLRB 244 (1997)	20
Federal Statutes	
29 U.S.C. sections 142(2), 143, 151, 152(3), 152(12), 158(b)(4)(D), 158(g)	14
State Statutes	
Cal. Lab. Code Section 512	12

1
2
3
4
5
6
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8
9
10
11
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I. INTRODUCTION

The exceptions filed by Purple Communications support the cross-exceptions concurrently filed by the Charging Party. Purple's Exceptions and Brief show precisely why Video Interpreters are entitled to use the email system and other electronic communication systems for protected concerted activity during work time and non-work time. In this Brief, we will reply to Purple's exceptions and show how its Brief strengthens the arguments made in the cross-exceptions.

Fundamentally, Purple's Video Interpreters are allowed unrestricted access to electronic communication systems including email. They use this email system for communication about various issues including wages, hours and working conditions during both work time and non-work time. Moreover, as illustrated by Respondent's exceptions and is further demonstrated by the record, there are substantial periods of time during the day when Video Interpreters are not actively engaged in interpreting for the clients. During this time, much of which is work time, they are free to use electronic communication systems for work related purposes, including protected concerted activity or communications about union activity.

II. SOME GENERAL COMMENTS ON ISSUES RAISED BY THE EXCEPTIONS

The ALJ made a fundamental finding that we will explore in this Brief. Although accurate, it does not go far enough:

The Respondent assigns an individual email account to each interpreter and the interpreters are able to access these accounts from the workstation computers as well as from their home computers and personal smart phones. Employees use the company email system on a daily basis while at work for communications among themselves. The company email is also use for communications among managers and employees.
(ALJD p. 3: 16-20.)

Purple ignores this finding and the consequences.

There are three different phrases used to describe communications: (1) Personal; (2) business or non-business (3) work or non-work related. In all cases, Section 7-protected communications are work and business related. Such communications are protected only if they

1 relate to “wages, hours and other conditions” of employment and concern union activity or
2 concern “mutual aid or protection.” In this Brief, we want to make it clear that such
3 communications, whether characterized as “personal” or “non-work” or “non-business” related,
4 are protected and are always related to work.¹ Purple states that the purpose of its policy “is to
5 prohibit all personal use of email....” (Brief p. 5.) This is a rhetorical avoidance of the issue for
6 communications about working conditions are not personal, they are related to work and business.

7 In this Brief, we will emphasize the use of the email system during work time.² This will,
8 in our view, prove our point that these employees have routine access to the email during work
9 time and may use it for protected concerted activity or Union related matters during work time,
10 provided the employer is unable to demonstrate any substantial business justification to prohibit
11 use at the time it is in use by the video relay interpreter. We will highlight those facts below in
12 response to Purple’s claims. We submit that the record shows that the employer allows use of the
13 email system during all times when the employees are at the worksite, both work time and non-
14 work time.³ Thus, there are no special circumstances or justification to limit the use of the email
15 during work or non-work time on this record.⁴

16 Finally, although we and Purple focus on email, nothing in Purple’s Exceptions suggests
17 some different principle should apply to other forms of electronic communications systems.

18 **III. PURPLE’S OPERATIONS**

19 As described by the FCC website and Purple’s website, VRS provides interpretive
20 services using American Sign Language for customers who have hearing impairments (either
21

22 ¹ As discussed below, we acknowledge that an employer may implement an electronic
23 communications policy that limits such communications systems to specific business during
24 work hours uses so long as such rules are not discriminatorily enforced.

25 ² We use the traditional definition of work time used by the Board in *Purple Communications I*
26 to exclude before and after work, lunch and rest breaks.

27 ³ The Board has already found that VIs have 10 minutes per hour when they don’t have to be
28 interpreting that is work time for which they are paid. *Purple Communications I*, Slip Op. p
65. This is work time during which VIs are free to use the internet or intranet for email
purposes.

⁴ The ALJ need not reach the question of whether the employer could limit the use of email in
all circumstances when the VI is interpreting with a client. The employer has not asserted this
as a special circumstance, and it has not occurred on this record.

1 hard of hearing or deaf). Purple's services are displayed on its website.

2 (<https://www.purple.us/contactus?mID=68>. See also Board Decision at p 2.)

3 Purple accurately describes its business at pages 3-4 of its Brief. It takes no exception to
4 the findings of the ALJ.

5 Purple is involved in a specialized portion of the communications industry. It facilitates
6 communication between the deaf and hard of hearing and others through Video Relay Interpreted
7 Services. The Federal Communications Commission finances and controls this program, known
8 as the Telecommunications Relay Service ("TRS"). It describes VRS as follows:

9 VRS, like other forms of TRS, allows persons who are deaf or hard-of-hearing to
10 communicate through the telephone system with hearing persons. The VRS caller, using a
11 television or a computer with a video camera device and a broadband (high speed) Internet
12 connection, contacts a VRS CA, who is a qualified sign language interpreter. They communicate
13 with each other in sign language through a video link. The VRS CA then places a telephone call
14 to the party the VRS user wishes to call. The VRS CA relays the conversation back and forth
15 between the parties -- in sign language with the VRS user, and by voice with the called party. No
16 typing or text is involved. A voice telephone user can also initiate a VRS call by calling a VRS
17 center, usually through a toll-free number.

18 The VRS CA can be reached through the VRS provider's Internet site, or through video
19 equipment attached to a television. Currently, around ten providers offer VRS. Like all TRS
20 calls, VRS is free to the caller. VRS providers are compensated for their costs from the Interstate
21 TRS Fund, which the Federal Communications Commission (FCC) oversees.

22 (<http://www.fcc.gov/guides/video-relay-services>.)⁵

23 Although Purple is in the communications industry, it has not accurately communicated
24 the nature of the use of its electronic communications systems.

25 ⁵ This service is one form of the services offered by Telecommunications Relay Service, which
26 assists persons with hearing or speech disabilities to communicate. (See
27 <http://www.fcc.gov/encyclopedia/telecommunications-relay-services-trs>.) These services are
28 all part of a broad effort by the FCC to provide communications services to various disability
communities. Text-to-Voice, Speech-to-Speech and Voice Carry Over are examples of these
services.

1 **A. THE NATURE OF PURPLE’S VRS SERVICES**

2 Purple operates call centers, which are open 24 hours a day, 7 days a week, 365 days a
3 year (Tr. 250), as required by the FCC rules. Purple operates sixteen call centers (Tr. 250),
4 although it makes no difference where they are physically located because of the requirement that
5 the calls be routed in the order they are received. The video interpreters (VIs) in the two centers
6 involved, Corona and Long Beach, work in shifts; so, although there are 42 (Long Beach) or 31
7 (Corona) employees, a small percentage of them work at any time in order for Purple to maintain
8 enough shifts to operate the centers 24/7.

9 The client uses a 10 digit phone number and calls in to access those services. Under the
10 FCC rules, the calls must be handled in the order in which they are received, and Purple must
11 respond within 120 seconds of receiving the call. Purple has implemented a Queue system so it
12 can monitor when the calls are backing up past the 120 seconds mandate imposed by the FCC.
13 (Tr. 154.)

14 The client is seen on a video screen, and the client must have similar video screen
15 capability.⁶ Clients and Purple have proprietary equipment and software used to process the calls.
16 (Tr. 46.) All of this is done on the Internet through high speed lines. VIs who work for Purple
17 are certified according to industry standards established by a national organization of such
18 interpreters. (<http://www.rid.org/>. Tr. 270-71.) The hearing impaired are equally well-organized
19 and have their own advocacy organizations. (<http://www.nad.org/>.)

20 **B. THE THREE DIFFERENT TYPES OF COMMUNICATION SYSTEMS USED BY**
21 **THE INTERPRETERS**

22 Purple’s description of the communications systems is not entirely accurate.

23 Each VI is provided an email address, [xxx]@purple.us. (Tr. 26, 47.) Interpreters use the
24 email every day. (Tr. 48, 129.) Clients must provide an email address to use Purple’s services.
25 <https://www.purple.us/register/default.aspx>.

26 There are three different computer terminals used by the VIs: (1) computers at their
27 workstations, (2) a computer maintained in a central portion of the office, known as the Queue

28 ⁶ The service is detailed on Purple’s website: <https://www.purple.us/usernotice>.

1 computer, and (3) a terminal in the lunch or break rooms. The email communication systems
2 made available by Purple to its VIs in each of those settings are as follows:

3 **Workstation:** There is limited internet access, and it is used only for the purposes of
4 signing on by the VIs. VIs have access to Purple's Intranet at their workstations. (Tr. 25.)
5 Purple states in its Brief that VIs have access to email "at each workstation", Brief p. 4, and we
6 accept this assertion. Thus VIs have both intranet access and email access at the work stations⁷

7 In addition, VIs have a phone connection to use to talk to third parties with whom the
8 communication is made for the hearing impaired client. The VIs use the computer to connect
9 with the video screen at the client's location. VIs also have games available that are already
10 loaded into the computer system. (Tr. 46.)

11 **QUEUE**⁸: This is a computer located in the center part of the office. This computer has
12 Internet Explorer access to the internet. AOL Messenger is constantly on, and this computer is
13 generally used for communicating operations through AOL Messenger. The interpreters all have
14 access to Internet Explorer on this terminal.

15 Purple suggests in its Brief that the "Queue" compute is located only in the Long Beach
16 Office, Brief p. 4. But the "queue" system is company wide and presumably one exists in each
17 facility since all calls are handled in the same manner through a centralized queue system. (Tr.
18 250).

19 **The Break Room:** In each of the centers (Tr. 27, 50), there is a computer available to the
20 employees in the break room to which there is Internet access. The company intranet is available
21 as well as other programs, such as Microsoft Word. (Tr. 27.) Purple agrees that email and
22 internet are available in the break rooms. (Brief p. 4.)

23 **Personal Computers or Cell Phones:** VIs can access their email from their personal
24 PDAs or other devices. (Tr. 10, 204-05 and 210.) Purple agrees.

25
26 ⁷ This is supported by the record. (Tr. 46: 20-47:2.)

27 ⁸ In the record the transcript refers to "cue" and "ceue" but not "queue." All parties agree it is a
28 "queue" computer reflecting the fact that all calls are put into a "queue" for answering in the
order in which they are received.

1 **C. THE USE OF PURPLE’S COMMUNICATIONS EQUIPMENT.**

2 (1) **Email.** The email system, which is available to all the employees, has been used
3 by employees to communicate on issues of working conditions. (Tr. 64.) Managers will often
4 respond to employee emails on the weekend. (Tr. 141.) The VIs have access to their emails on
5 their personal devices and use it anytime, 24/7. (Tr. 204-05 and 210.) Management similarly
6 uses the email during non-work hours. (Tr. 204-206, 211.) VIs used email during the campaign
7 to circulate an anti-organization petition. (Tr. 71.) VIs advised management of the petition and
8 asked management to stop its circulation. (Tr. 76-79 and 192.) One manager responded to the
9 inquiry regarding the petition. (Tr. 193.) As noted, the employees have access to the company
10 email from their personal devices and have used it. (Tr. 10 and 211.)

11 Purple uses the email system to send memos to the interpreters regarding working
12 condition issues. (Tr. 132. See also, Emp. Ex. 10 [key metric adjustment memo to all video
13 interpreters] and Ch. P. Ex. 7 [announcing bonus].) Purple also has a newsletter which it sends
14 through the company email to the employees. (Tr. 238.) The President of the company testified
15 that the email was used during the representation election campaign. (Tr. 303–04.) The Hostess
16 bankruptcy was the subject of “communique” among VIs and management. (Tr. 272.) When
17 describing communications between employees, it is apparent that when the word “talk” is used,
18 Purple is referring to the use of the email. (Tr. 207.)

19 Purple, in order to encourage communications, has an open door policy. (Jt. Ex. 1 at p.
20 29.) Because the headquarters are located in a remote location in Rocklin, California, it is
21 apparent that these open door communications are encouraged to be accessed by email since
22 employees can’t communicate with the President or the Human Relations Department except by
23 email or by phone.

24 During the election campaign, Purple admitted the lack of communication and the
25 necessity of communication among the employees. Employer CEO John Ferron used the term
26 “communication” repeatedly in captive audience meetings. He complained repeatedly about the
27 lack of communication and said that Purple would encourage more communication in an effort to
28 improve the workplace. (Tr. 273, 278.) The Board made these findings in *Purple*

1 *Communications, Inc.*, 361 NLRB No. 43 2014), slip op. at p. 3, in ordering new elections at the
2 two sites.

3 (2) **Internet.** VIs have unlimited access to the internet in the break room and the
4 Queue computer.

5 (3) **Intranet.** Human Resources material is available on the intranet. It is available at
6 the workstation and in the break room. (Tr. 25 and 27.)

7 (4) **Social Media.** Purple also relies on various social media services. There is no
8 limitation on employee access to such sites at any time.

9 (5) **Phone.** The company rules allow limited personal use of the phone up to three
10 minutes a call. (See Employee Handbook, Jt. Ex. 1 at p. 29 [prohibiting making or accepting
11 personal telephone calls, including cell phone calls, of more than three minutes in duration during
12 working hours, except in cases of emergency].) This policy does not prohibit employees from
13 using their cell phones, including, presumably, emails or text messaging. Similarly, if an
14 employee is hearing impaired, the employee is specifically permitted to use “relay” in the
15 “normal course of your business” to make that “personal” call. (Jt. Ex. 1 at p. 33.)

16 **D. PURPLE’S ELECTRONIC COMMUNICATIONS POLICY APPLIES TO ALL OF**
17 **THESE SYSTEMS:**

18 The policy is as follows:

19 **INTERNET, INTRANET, VOICEMAIL AND ELECTRONIC COMMUNICATION**
POLICY

20 “Computers, laptops, internet access, voicemail, electronic mail
21 (email), Blackberry, cellular telephones and/or other Company
22 equipment [which] is provided and maintained by the [sic] Purple
23 to facilitate Company business. All information stored, sent, and
received on these systems are the sole and exclusive property of the
Company, regardless of the author or recipient. All such equipment
and access should be used for business purposes only.

24 **Prohibited activities**

25 “Employees are strictly prohibited from using the computer,
26 internet, voicemail and email systems, and other company
equipment in connection with any of the following activities...”

27 2. Engaging in activities on behalf of organizations or persons with
28 no professional or business affiliation with the Company

1 5 Sending uninvited email of a personal nature.
2 (Purple Communications I, Slip Op. p. 2–3.) (Jt. Ex. 1 at p. 30–31.) See Purple Brief p.4-5.

3 **E. THE USE OF EMAIL FOR WORK RELATED PURPOSES**

4 As noted above, the ALJ found that employees and Purple use email during worktime for
5 work related communications. Moreover, there is very specific conduct which supports this.

6 In particular, the Board should now make factual findings regarding Respondent Exhibit
7 8, which contains messages sent to and from Purple Communications employees using company
8 e-mail to seek support for an anti-union statement.⁹ (See Resp. Ex. 8, unnumbered p. 4 [e-mail
9 from marie.treacy@purple.us to renee.souleret@purple.us]; unnumbered p. 7 [e-mail from
10 mary.dettorre@purple.us to renee.souleret@purple.us].) The employees presented this statement
11 with its attached emails to Purple Communications (Resp. Ex. 8, unmarked p. 1 [cover letter
12 addressing statement to company representatives]; Tr. 135-37), so Purple Communications was
13 aware of this use of its email system by its employees for the work related and Section 7-
14 protected purpose of soliciting opposition to the union.¹⁰ In fact, Purple introduced copies of
15 these e-mails as an exhibit in the hearing in this case.

16 The email exchange represented in Resp. Ex. 8 and 4, consisting of numerous emails
17 between employees, was sent, in many instances, during the day, presumably during working
18 hours.¹¹

19
20 ⁹ The ALJ failed to specifically reference these emails however they are included in his general
21 finding of email use.

22 ¹⁰ This is important because the Board mistakenly stated in its decision that “[t]he record is
23 sparse regarding the extent to which the interpreters have used the Respondent’s email for
24 nonbusiness purposes,” (*Purple Communications I*, 361 NLRB No. 126, at Slip Op. p. 3) and,
25 in particular, appears unaware of the clear record evidence of Purple Communications
26 permitting employee use of its email system to solicit opposition to the union. The Board
made this comment although the ALJ did note the use by VIs of email during work times for
both soliciting opposition to the Union and addressing this conduct to management. (*Purple
Communications I*, Slip Op. p. 64–65 [ALJ Decision] [describing use of email by
employees].) This mistaken impression of the record evidence is based on the fact that the
ALJ did not address employee nonbusiness use of company email, resolving the *Register-
Guard*, 351 NLRB 1110 (2007), issue in his original decision.

27 ¹¹ We don’t know whether the VIs were on work time, but it is clear this is during working
28 hours during the day (10:13 a.m.; 3:18 p.m.; 10:34 a.m.; 10:38 a.m.; 8:04 a.m.; 7:33 a.m.; 8:20
a.m., 8:21 a.m. and 3:41 p.m.). Mr. LoParo and Ms. Kroger both testified that their emails
were sent from work during working hours.

1 Most evident is the email from Judith Kroger, a Union supporter, to her manager,
2 complaining about the anti-union activity during work time. (See Resp. Ex. 4 [email dated
3 November 14, 2012].) Her supervisor responded later that day, and Ms. Kroger immediately
4 thanked him. (*Id.*) Ms. Kroger testified that she sent that email during work time to complain
5 about the activity going on at the worksite. (Tr.191-92.) This was an evident use of the email for
6 work related purposes which illustrates our point about the use of email by employees during
7 work hours with apparent approval by management.¹²

8 The same use of the email was made by Mr. LoParo. He emailed his supervisor, who
9 responded about anti-union activity. This activity was found by the ALJ and undisturbed by the
10 Board. (*Purple Communications I*, Slip Op. p. 65 [ALJ Decision]; Tr. 76–82.)

11 In addition, the Board should find, based on the existing record, that employee business¹³
12 use of company email was routine and tolerated by Purple Communications. In addition to
13 Respondent Exhibits 8 and 4, the record contains evidence, as the ALJ previously found, that
14 “[e]mployees routinely use the work e-mail system to communicate with each other.” (*Purple*
15 *Communications I*, Slip Op. p. 62 [ALJ Decision]. See also Tr. 26, 47.) In addition, “interpreters
16 can access [their company email] accounts . . . from their home computers and smart phones” as
17 well as from “shared computers that are located in common areas” where employees take breaks.
18 (*Ibid.* See also Tr. 27, 49-50, 211.) Finally, the company provided no evidence of any employee
19 ever being disciplined for violating its electronic communications policy. (Tr. 309–10.) On the
20 basis of these three undisputed facts — routine employee use of company email to communicate
21 with one another, unlimited employee access to company email on non-work time including in
22 break rooms and from home and work time, and the fact that no employee was ever disciplined

23 ¹² The ALJ described this in some detail. (*Purple Communications I*, Slip Op. p. 64 [ALJ
24 Decision].)

25 ¹³ “Business” means work related in some circumstances. Non-business, in this context,
26 includes the anti-union emails as well as the email from one worker questioning the anti-
27 union emails. All of these were work related and certainly were activity for “mutual aid or
28 protection.” To be clear, they also were not “personal,” in the sense that they were unrelated
to work issues, such as emails about soccer, church or social events. As noted above, Purple
explicitly allows use of phones for personal purposes. The rule at issues does not allow
“uninvited email of a personal nature,” so, presumably, it allows invited emails, meaning
email exchanges of a personal nature.

1 for nonbusiness use of company email — the Board should draw the reasonable inference that
2 employee work related use of Purple Communications’ email system to communicate about
3 wages, hours and other conditions of employment was routine and tolerated by the company.

4 Purple never address these facts. It asserts “[t]he intention and effect of that provision is
5 to prohibit all personal use of email, and that Policy has been enforced uniformly.” Brief p 5.
6 There is no evidence of “personal” use of email or electronic communications as we have
7 described “personal” meaning unrelated to work or business. Nor is there any evidence of
8 enforcement of the rule on the record. There is extensive evidence of use of email for work
9 related purposes including communications about wages, hours and working conditions.
10 Charging Party’s case does not rest on “personal use.” There will be other cases where
11 “personal” use is allowed by employers.¹⁴ This unrestricted use by management and VIs of email
12 repudiates the position of Purple taken in its Exceptions and supports Charging Party’s position
13 that since VIs have general access to email during working hours, they may use such email to
14 communicate on wages, hours and working conditions and union activity all of which are
15 protected.

16 **F. PURPLE’S BUSINESS MODEL CREATES PERIODS OF TIME WHEN VIDEO**
17 **INTERPRETERS ARE NOT ENGAGED IN PRODUCTION, WHICH IS**
18 **RESPONDING TO CALLS AND INTERPRETING USING PURPLE’S**
COMMUNICATION SYSTEMS.

19 VIs have periods of time during the work day when they are not engaged in “production,”
20 meaning answering calls from clients and interpreting for them using the communications
21 services. In order for the Board to properly evaluate the availability and use of email in this
22 workplace, we describe this below.

23 VIs process calls during a period that is somewhat less than 100% of their “work time.”
24 VIs are expected to be logged in only 80% of their time for core hours and 85% for non-core
25 hours. (Tr. 85-86.) Purple agrees to this. (See Brief p. 5.) Log-in means that the VI is “to be
26 sitting in your chair, logged into the system waiting for calls to come in.” (Tr. 86.)

27
28 ¹⁴ As noted below, the rule prohibits only “uninvited email of a personal nature,” so presumably
invited communications or at least communications which are not objected to are permissible.

1 However, there is much more time when VIs are not taking and handling calls, which
2 Purple ignores. The VI has to be processing calls only 55% of the shift. This is billable time for
3 which the FCC is billed by the minute, so the more processing time, the more Purple is
4 reimbursed. The processing time is the critical metric for reimbursement and the business model.
5 (Tr. 42, 85, 86.) These metrics had increased before the organizing and then changed again just
6 before the election. (Tr., 85-88.) Purple implemented a “High Traffic Fail Safe” (Em. Ex. 9),
7 which reduced the expected log-in time when utilization met high traffic conditions. Even under
8 these metrics, VIs were expected to be interpreting 55% of the shift (132 minutes out of 240
9 minutes), which would be reduced during the remainder of the 8 hour shift to 46% (122 minutes
10 out of 240 minutes). Purple ignores this.

11 It is apparent that between the log-in time and the actual processing time, there are periods
12 of time “in between calls.” (Tr. 107 and 172.) There is no evidence in the record that their
13 activities are restricted when they are logged-in but not on a call. Presumably, when they start the
14 call by reaching out to the client, they must be at the work station using the computer and be
15 prepared to complete the phone hook up. There is no evidence of any limitation on activities
16 during this non-productive time.

17 This work schedule means that VIs are actively working, that means interpreting, for
18 approximately 50% of the time that they are in the facility. For approximately 15% to 20% of the
19 time, they are not actually logged in and thus have no responsibility for video interpreting. Purple
20 ignore these facts that there are significant periods of time when VIs are not engaged in production
21 and use of electronic communications about working conditions will not interfere with any
22 articulated business purpose.

23 The VIs are entitled to a 10 minute break every four hours, as provided for by Purple
24 policy. (Jt. Ex. 1, p 21.) During this break period, they are paid and do not have to log out of

25 ///

26 ///

27 ///

28 ///

1 their computers. (Tr. 74.)¹⁵ In California, this is also state law. (See IWC Order 4, Section 11.)
2 Under California law, the employee is not forced to take a break, it must be available.

3 Employees are also entitled to a 30 to 60 minute meal period during which they are
4 relieved of all duty. (Jt. Ex. 1, p 21.) The VIs log out, and they are not paid for that time. In
5 California, this is also state law. (*Id.* at p. 21. Cal. Lab. Code Section 512; IWC Order 4, Section
6 12.) Purple concedes the existence of lunch periods (although claim it is only 30 minutes) but
7 does not concede the existence of the legally mandated rest breaks. (Brief p. 5.)

8 The amount of actual interpreting time, processing time and log-in in time are limited
9 because of ergonomic concerns. (Tr. 253, 298.) Purple expects each of the VIs to take a 10
10 minute break each hour from interpreting with clients. (Tr. 75.) Presumably this is “free time”
11 when they can read, talk with other VIs or engage in non-interpreting activity not involving the
12 use of the interpreting communication equipment. Purple ignores this.

13 Finally, in order to encourage VIs to work more efficiently, the company maintains a
14 bonus system that is based upon the amount of processing time. (Tr. 161.) Purple ignores this.

15 Although work time is defined from when the VI logs in until when the VI logs out, the
16 business model is designed to permit a portion of time in several blocks and/or each hour when
17 the VIs are not actively working. They are paid for this time but are free to leave their
18 workstations or remain at their work stations and are free to engage in communications with other
19 interpreters or managers or use their email, the phones¹⁶ or the internet. They are free to go to the
20 break rooms. The company maintains a minimum standard processing time that allows some
21 remaining time that is paid and that is work time but which does not require interpreting. Purple
22 ignores this.

23 There are workplaces where this is common. Truck drivers wait for a dispatch. Machine
24 operators wait while material is delivered. Assembly line workers wait for the next batch of
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26 ¹⁵ The Board has already found that VIs have 10 minutes per hour when they don’t have to be
27 interpreting but which is work time for which they are paid. (*Purple Communications I*, Slip
28 Op. p 65.) This is work time during which VIs are free to use the internet or intranet for email
purposes. State law requires such paid breaks. (Industrial Welfare Commission Order No. 4.)

¹⁶ Purple’s phone rule allows personal calls up to three minutes. (Jt. Ex. 1, p. 28–29.)

1 product. There are times during any work time when employees are not engaged in direct
2 production. They are free to talk and communicate, or they can just wait. It is work time and
3 compensable. Purple has a business model where the non-productive time is greater than in many
4 workplaces.

5 IV. ARGUMENT

6 A. ELECTRONIC COMMUNICATIONS SYSTEMS MAINTAINED BY PURPLE 7 SHOULD BE AVAILABLE TO EMPLOYEES TO COMMUNICATE FOR 8 PROTECTED CONCERTED ACTIVITY AND UNION ACTIVITY DURING 9 WORK AND NONWORK TIME.

10 1. Purple Makes Pro Forma Arguments Which Have Already Been Rejected By 11 The Board In Purple communications I.

12 We only briefly addressed those issues since they were fully addressed by the Board. We
13 addressed those issues largely to the extent that they support Charging Party's position that where
14 an employer such as Purple generally allows employees access to an email system, the law should
15 create a presumption that such access allows for communication of matters relating to working
16 conditions, including relating to efforts to form, join or assist a labor organization or for mutual
17 aid and protection within the meaning of Section 7. Such a presumption could be rebutted by an
18 employer who expressly limits the email system *during work time* to specific and defined
19 business uses or limits and demonstrates that it strictly enforces such a rule. Where such business
20 uses include matters of wages, hours or working conditions, employees may use such
21 communication systems for communications relating to working conditions during work hours.¹⁷
22 We believe this is a practical approach that accommodates employer interests and the Section 7
23 rights of employees under the Act. We believe the Board's Decision in *Purple* does this
24 implicitly. We also believe Purple's Exceptions support this implicitly.

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28 ¹⁷ One variant of the restriction would be an email system on an intranet where the employees
would receive emails and not have access to sending emails. In those cases, the employer
would not have opened up the email system to general use.

1 As a corollary, where the employer, such as Purple, allows any personal use of the email,
2 meaning non-work related¹⁸ use, the employees may use the email for communication about
3 efforts to form, join or assist a labor organization or for mutual aid or protection. Here, Purple
4 does this by creating a presumption that, during all non-work time, the employee may use the
5 electronic systems without restriction for protected concerted activity or union activity. Here,
6 Purple additionally does this by prohibiting only “uninvited email of a personal nature.” (Jt. Ex. 1
7 p. 30–31.) By allowing personal email, which is unrelated to work at all times (work and non-
8 work times), it has no justification to limit email about work place issues. Once again, we
9 concede there is no evidence of “personal” use of email but Purple does not argue that it has not
10 occurred.

11 Although this case focuses on email, this rule should apply generally to employer
12 electronic communication systems.¹⁹ There is some difference between access through a
13 company provided computer terminal at work and employee provided electronic device, either of
14 which can access email or other communication systems. The principles of access and use that
15 Section 7 seeks to protect are, however, the same. We address concerns attempting to encompass
16 the broad array of such systems.

17 Purple argues first (Brief p. 7-9) that it has a property right in excluding VI’s from using
18 the email for protected communications. Purple particularly argues that the Board’s decision
19 “impermissibly affords less protection to employer-provided email that it does not provide other
20 types of employer owned property.” (Brief p. 8). As the facts which Purple concedes and which
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22 ¹⁸ We use the term “work related” rather than “business related.” The term business is
23 ambiguous since employees could reasonably interpret “business related” to exclude
24 communications about wages, hours and working conditions. The Board uses the term
25 “work” in other contexts, and it follows the statutory language that recognizes “work” and
26 “working.” 29 U.S.C. sections 142(2), 143, 151, 152(3), 152(12), 158(b)(4)(D), 158(g).
27 “Work” thus encompasses both business issues that may not relate to wages, hours and other
28 conditions of employment as well as those that do. Of course, if the employer prohibits any
communications specifically about working conditions, that would not be permissible. We
point out that the term “business,” as used by Purple, suffers from this ambiguity. It is thus
overbroad.

¹⁹ This rule would not apply to physical communications systems, such as bulletin boards or fax
machines. It would apply to a fax program that allowed employees to fax a document from
the computer directly just as the employee could send an email attachment directly.

1 are described above demonstrate VI's already have access to email 24/7 for work related
2 purposes. They have unrestricted right to use the email and other electronic communication
3 systems for communications about work issues. Purple communicates with them about work
4 issues and they communicate with Purple and among themselves about work related issues. The
5 VIs are already on the communication systems as full-fledged users. There is no property interest
6 which Purple has in excluding VI's from using the electronic communication systems which they
7 already have access and which is virtually unrestricted.

8 Purple argues that VI's have "other channels in which they can communicate...." (Brief
9 p. 8.) We concede that VIs may have such other means, but that does not affect that fact Purple
10 already allows them generally access to the email and electronic communication systems. The
11 Board expressly rejected this in Purple I. (See Slip Opinion p. 14.)

12 Purple complains because the Board's decision will disallow its "ability to monitor
13 employee productivity on email system, without at least creating the appearance of unlawful
14 surveillance." (See Brief p. 9). The Board addressed this as Purple concedes. (Slip Opinion p.
15 5.) Here, if Purple does not address it, it already has means of addressing the amount of
16 productive time and nothing in the Board's decision affects the right of Purple to continue to
17 address those issues. Of course, if Purple were to begin to monitor email for the word "Union" or
18 for other protected communications that would be a different issue. The Board need not address
19 that issue in this case because as the record demonstrates, Purple generally allows access to the
20 email and electronic communications by video interpreters. Furthermore, Purple has offered no
21 evidence it monitors employee use.²⁰

22 **B. NOTHING IN THE BOARD'S DECISION INTERFERES WITH THE**
23 **EMPLOYER'S RIGHTS PROTECTED BY SECTION 8 (C) IN THE FIRST**
24 **AMENDMENT.**

25 Purple makes the already rejected argument that the Board's decision interferes with the
26 right specified in Section 8 (c) in the First Amendment. (See Brief p. 9-10.) The Board rejected

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28 ²⁰ Purple maintains a commonplace nondiscriminatory notice of the right to monitor company
provided equipment. (See *Jt. Ex. 1*, p. 30.)

1 these arguments in Purple and there is no need to readdress them in this Reply Brief. See Slip
2 Opinion page 16.

3 We do note, however, that effectively what Purple wants is the right to prohibit
4 communications which it does not like. But Purple's position would create an unsustainable
5 position from the Board in having to disallow communications based solely on their content as to
6 whether they were liked or disliked with respect to wages, hours and working conditions.

7 Nothing in the Board's decision limits the Employer's right to otherwise monitor and
8 prohibit otherwise inappropriate communications. Here, there is no evidence that Purple has
9 experienced such an issue. In any case, Purple, like other employers, has an anti-harassment
10 policy which would apply in circumstances covered by that policy. (See Joint Exhibit 1 page 6-7.)

11 **C. PURPLE ARGUES THAT THE BOARD'S RULES REGARDING EMPLOYER**
12 **DISTRIBUTION OF LITERATURE SHOULD APPLY.**

13 Purple makes the argument that email should be considered written material and
14 distribution disallowed in non-work areas. (See Brief pp. 10-12.) Once again, Purple's
15 use of email and electronic communications which is unrestricted and to which Video Interpreters
16 have general access refutes this argument. In fact, under Purple's argument the interpreters
17 would be prohibited from using the email to respond to work related issues from management or
18 to communicate with themselves about work related issues.

19 **D. PURPLE OBJECTS TO THE RETROACTIVE NATURE OF THE REMEDY.**

20 Purple complains because it relied upon the Board's decision in *Register-Guard* 351
21 NLRB 1110 (2007) enfd in relevant part and remanded sub nom. *Guard Publishing v. NLRB*,
22 571 F.3rd 53(D.C. Cir. 2009). The short answer is that Purple, like every other employer, knew
23 that this issue was pending before the Board and that the General Counsel was seeking to overrule
24 *Register-Guard*. There is no prejudice, nor has the Board inappropriately applied the rule to
25 Purple in this case.

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1 **E. SUMMARY OF ARGUMENT**

2 In summary, Purple has just made pro forma arguments, all of which were squarely
3 rejected by the Board in *Purple Communications I*. More importantly, Purple's arguments
4 illustrate that the Board's decision is too narrow. We address that issue below.

5 **V. THE BOARD'S DECISION IS TOO NARROW.**

6 In cross-exceptions, the Charging Party addresses the narrowness of the Administrative
7 Law Judge's decision and his application of *Purple Communications I* to the circumstances of
8 this case.

9 Purple could establish strict rules regarding use of email or other electronic
10 communications during work time. The Board's decision in *Purple Communications I* makes it
11 clear that where employees have access to email or other electronic communication systems, they
12 may use those systems during non-work time.

13 An employer such as Purple may limit use of the email to strictly defined business related
14 purposes *during work time* where it establishes such a clear rule and strictly enforces the rule.
15 This accommodation recognizes that there may be managerial reasons to limit communications
16 *during work time*. For example, in the hospital setting, discussions in front of patients or in
17 patient care areas may be limited. An employer could limit email use only to communications
18 with customers or for a specific purpose such as checking on the status of orders. Similarly, in a
19 retail setting, discussion can be limited on the sales floor in front of customers. VIs cannot be
20 communicating with others while interpreting in front of clients on the video screen. A
21 communication system could be implemented which permits only one-way communication, such
22 as managers to employees, but not reverse or between employees. But, like every such
23 substantial managerial interest, it must be narrowly applied and subject to a substantial
24 managerial interest. We submit that any employer who wants to implement and enforce such a
25 rule should carry the burden of establishing that it promulgated such a clear rule and enforced it.
26 Proof of enforcement falls upon the party that has access to the records to prove this. The
27 employer can retain emails for a reasonable period of time and will likely do so in a context
28 where it has such a managerial interest. Employees are not likely to save all emails, and

1 employers do so as matter of course. Finally, we think this is practical. When employees
2 communicate about work related issues, they often mix in personal matters. We just don't think,
3 and neither will the Board agree, that it is likely that any employer that allows email use will
4 strictly enforce any rule against any communication on all non-work related matters. But with
5 respect to oral communications by phone, in person, Skype, 2-way radio or any other system,
6 personal remarks and communications, either standing alone or in conjunction with work related
7 communications, are the rule and the accepted norm for workplace communications. Purple does
8 not so limit the use, and this perfectly illustrates the point. Purple's exceptions underscore the
9 fact that it does not so limit the use of email or electronic communication systems.²¹

10 This is not to say that employees are always entitled to use their employers' electronic
11 communications systems for Section 7-protected communications, nor does it mean that
12 employers are prohibited from maintaining reasonable non-discriminatory rules regarding
13 employee use of company electronic communications systems.

14 Where an employer *altogether* denies employees the right to use a company electronic
15 communications system for any communications, employees have no right to use that system for
16 Section 7-protected communications relating to wages, hours and conditions of employment.
17 Purple, as the Board recognized, does not altogether deny employees the right to use the
18 electronic communications system. (Slip Op. p 3.) Purple does not altogether deny the
19 employees the right to use the electronic communication systems.²²

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25 ²¹ An example might be that Purple would limit the use of email only to communications between
26 Video Interpreters and clients. That rule, however, would not work for Purple since it has wide
27 spread call centers, a human resources department located elsewhere and encourages and allows
28 the interpreters to use the email and electronic communication systems 24/7 for various purposes.

²² Purple does not address the issue of whether it could limit solicitation to non-working time.
We do not address that issue in this Reply Brief but address it in our Brief in support of cross
exceptions.

1 **A. THE BOARD HAS REPEATEDLY FOUND THAT USE OF EMAIL DURING**
2 **WORK HOURS IS PROTECTED.**

3 Since the first email case in 1993, the Board has recognized that employees, once they
4 have access to email, use it for work related purposes, including communicating issues about
5 working conditions during working time. (*E. I. Du Pont De Nemours & Co.*, 311 NLRB 893,
6 9191 (1993).)

7 Thus, as long as an employer such as Purple allows any communication during work time
8 about work related matters, it cannot prohibit such communications when they involve issues
9 concerning the workplace, including how those conditions might be improved. Furthermore, so
10 long as the employer uses the email system to communicate about wages, hours and working
11 conditions or matters of mutual aid and protection, it cannot prohibit employees from doing the
12 same.²³ And further, where any employer such as Purple allows use of email for personal
13 purposes unrelated to working conditions, it cannot prohibit communications about work related
14 conditions. Again, however, the employer could limit email use to defined uses relating to
15 production. And, further, even in regard to workplace issues, it could make email available to
16 communicate only from employer to employees. Once the employer allows general use of email
17 among employees, it cannot prohibit use about workplace issues. Here, Purple has offered no
18 evidence that employee communication with other employees creates any interruption of service.
19 (Cf. *Conagra Foods, Inc.*, 361 NLRB No. 113 at * 3 (2014) [“Nor does a momentary interruption
20 in work, or even a risk of interruption, subject employees to discipline for conveying such union-
21 related information.”])

22 Here, Purple uses email for human resources communications, and this is the norm with
23 employers who have an intranet or email on the internet. (Tr. 64, 132. Resp. Ex. 10 [key metric

24 ²³ Member Miscimarra argues that even where the employer allows some access to employees it
25 should not allow use of such systems “for a wide range of employee-to-employee complaints
26 about working conditions and coemployees, the coordination of boycotts or walkouts against
27 the company and union organizing, among other things.” (Slip Op. p. 22 [fn. Omitted].) As
28 noted, an employer could implement a nondiscriminatory email system that allowed only one
 way communication, employer to employee. But once it allows employee to employee
 communication, it cannot foreclose Section 7-protected communication. Nor can it
 effectively foreclose communication to the employee by non-employees who have that email
 address except by filters or other non-discriminatory applications.

1 adjustment memo to all video interpreters] and Ch. P. Ex. 7 [announcing bonus]. See Purple
2 Communications, 361 NLRB No. 63 at note 13.) Where email is used for such purposes,
3 employees have a right to communicate with management or other employees about such issues
4 where, again, employees are given access to use of the email. *Timekeeping Systems, Inc.*, 323
5 NLRB 244 (1997), illustrates this principle from a case that arose almost 20 years ago. There, the
6 employer used its email system to communicate with employees about changes in vacation and
7 incentive bonus. One employee objected to the change in the vacation policy and offered a
8 detailed criticism of the change to the employer and copied the other employees. There was no
9 restriction imposed on employees that limited communication on the email system. When the
10 employee wouldn't retract his criticism, he was fired. The Board applied traditional principles
11 and found the conduct was concerted, protected and for mutual aid or protection. All of the
12 conduct was on work time. These were not personal communications.

13 The Board's recent decision in *California Institute of Technology*, 360 NLRB No. 63
14 (2014), illustrates this. Employees used the email system to engage in a vigorous and sharp
15 debate about a workplace issue involving privacy. The employees sent mass emails to other
16 employees and to outsiders, apparently on work time, concerning the subject of privacy and were
17 disciplined for their conduct. The Board had no trouble finding the conduct did not lose the
18 protection of the Act. The Board described the testimony of the director of Human Resources:

19 She aptly described these communications as being "part of the
20 fabric of every working group in every day work operations." She
21 continued: "[T]hat is part of, in a work group, what people inform
each other about."

22 (*Id.* at p. 14.)

23 This demonstrates our point that once access is allowed to email for email
24 communications among employees, employees are allowed to use it for purposes related to
25 mutual aid and protection. The employer cannot then discipline employees who use it to debate
26 workplace issues. (Resp. Ex. 8 and 4.)

27 This is forcefully illustrated in *Food Services of America*, 360 NLRB No. 63 (2014). The
28 Board sustained the termination of one discriminatee because he used the company email to

1 disclose “confidential business information.” (*Id.* at n. 4.) Note that the disclosure was
2 “confidential” information, not just business information. On the other hand, the email and
3 instant message exchanges between discriminatee Rubio and others was protected activity. From
4 the entire context it was clear that the employees were using company communications systems
5 and company email.²⁴ Food Services condoned this use and only terminated Mr. Rubio when it
6 objected to his instant messaging about job security. In summary, an employer can promulgate
7 clear rules limiting company communications systems to specific business purposes. It can
8 similarly limit solicitation for union or protected activity to non-work time. But once it allows
9 access to the email system without clear, strictly enforced business related limits, it cannot
10 prohibit communications about wages, hours and working conditions for mutual aid or protection.
11 These were not personal emails.

12 The Board’s Decision in *Hitachi Capital America Corp*, 361 NLRB No. 19 (2014),
13 supports this. *Hitachi* serves as another example where an employee used the electronic
14 communication system (email) to communicate on working conditions during work time where
15 she had general access to that system. The email exchange was in response to the employer’s
16 implementation of a new policy concerning inclement weather to which the discriminatee
17 objected. The employer used the email system to communicate on work related issues. The
18 exchanges occurred during work time throughout the day of February 3, 2011, beginning at 9:15
19 and ending at 2:55. Other employees used the email system to comment on working conditions.
20 Member Miscimarra notes in footnote 3 of his dissent that the discriminatee could have used the
21 email to respond further. He furthermore concurs that her emails were protected concerted
22 activity. (See note 7.) This demonstrates the accepted usage of company electronic
23 communications systems by employers and employees for discussion of issues related to working
24 conditions. These were not personal emails.

25 Recently, the Board affirmed a finding of a violation of Section 8(a)(1) where the
26 employer disciplined employees who used email for protected concerted activity on work time.
27 (*Grand Canyon Education, Inc.*, 362 NLRB No. 13 (2015), *reaffirming*, 359 NLRB No. 164

28 ²⁴ Many of the emails were forwarded from the company email system. (*Id.* at p. 14.)

1 (2013) [victim of *Noel Canning*].) This was not personal use of the email. It was work and
2 business related. There is no way to escape the conclusion that email use is commonplace during
3 work time, and the use of it for communication about work place issues is protected.

4 Of course, the employer has the right to limit communications to ensure productivity and
5 other substantial business needs. Just like it can make sure the VIs respond promptly to any
6 incoming call, it can ensure anyone with an employer communications service or device is not
7 distracted from his or her work task. Purple offered no evidence that email use by employees has
8 interfered with productivity. Just like employers can limit the time workers use to spend at the
9 water cooler, they can limit communications, as long as the limit is non-discriminatory.

10 **VI. THE REGISTER-GUARD RULE REGARDING DISCRIMINATION SHOULD BE**
11 **DISCARDED.**

12 Purple does not address the issue of the existence of the Register-Guard discrimination
13 rule because the ALJ did not recommend overruling that. That is the subject of the Cross
14 Exceptions. Purple, however, does not take exception to facts that demonstrate that there is no
15 legitimate business reason to prohibit Video Interpreters from “[e]ngaging in activities on behalf
16 of organizations or persons with no professional or business affiliation with the Company.

17 First, there are outside organizations with persons that do have a business affiliation or
18 professional relationship with Purple. The Federal Communications Commission, disability
19 rights advocacy groups and trade associations are examples. Unions are simply another example
20 of a professional or other organization which seeks to have a business affiliation with a company.

21 Although the Board declined in *Purple Communications I* to expressly overrule the
22 Register-Guard discrimination test (see footnote 13), the Board should do so now. There is no
23 evidence presented on this record that would offer a justification for discriminating against

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1 communications with “organizations.”²⁵ Here, it is particularly appropriate since the employer
2 tolerated emails that were anti-union and thus anti-organization.

3 Moreover, there is no basis to discriminate against communications with “persons.” As
4 we know, the term “person” now includes corporations and other entities, including unions. (See
5 *Citizens United v. FCC*, 558 U.S. 310 (2010).) Thus, the rule explicitly prohibits
6 communications with labor organizations, which are persons.

7 Moreover, the rule allows personal emails unless they are “uninvited email of a personal
8 nature.” (See Resp. Ex. 8 and 4.) The rule allows personal emails unless they are “uninvited
9 email of a personal nature.” The record thus compels a conclusion that *Register-Guard* must go
10 completely. *Purple Communications I* effectively overruled *Register-Guard*.

11 VII. CONCLUSION.

12 For the reasons suggested above, the Communications Workers of America urges the
13 Board to find that Purple allows the VIs to use email during work time for protected concerted
14 activities by communicating about work related issues. Purple’s Exceptions support this
15 conclusion. The record establishes such use, and the ALJ found such use. The employer declined
16 to offer any evidence to substantiate any limitation. As a result, there is no business justification
17 to restrict such use during work or non-work times. Purple has not implemented any rule
18 limiting such use. Although it may be possible to implement such a rule limiting the use during
19 work time when VIs are interpreting with a client, it has not done so.²⁶

20 On the basis of these three undisputed facts — employees routinely used company email
21 to communicate with one another during work time; employees had unlimited access to company
22 email on both non-work time and work time, including in break rooms and from home; and no
23 employee was ever disciplined for nonbusiness use of company email — the Board should draw
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25 ²⁵ Purple encourages VIs to participate in one outside organization. (See Jt. Ex. 1, p. 23 [Purple
26 pays RID membership] and <http://www.purple.us/careers> [Purple pays for professional
memberships].)

27 ²⁶ And, as noted above, the Board does not need to address the issue of whether this
28 circumstance would constitute special circumstances since Purple has not made this assertion.
Nor has Purple adopted any rule defining when email and electronic communications devices
cannot be used.

1 the reasonable inference that employee use of Purple Communications' email system was routine
2 and tolerated by the company during work and non-work times.

3 Employees can use employer email systems, including other electronic communications
4 systems, such as text messaging, voicemail, internet access and intranet for protected concerted
5 activity concerning mutual aid or protection or Union activity unless the employer adopts a clear
6 rule limiting the email system to a specific business purpose and strictly enforces that rule, which
7 Purple has not done. Nor has Purple prohibited all access to its email system. Here, the
8 employees have access to email during work time. Purple cannot foreclose them from accessing
9 email during non-work time and, in this case, during work time. This reflects the modern day use
10 of electronic communication systems as found by the Board, including the dissents, in *Purple*
11 *Communications I*. It protects and properly balances the rights of employers and employees.

12 Purple's exceptions support these propositions. Purple concedes that Video Interpreters
13 have general access to the email on their electronic communication systems. Purple has offered
14 no business justification which would overcome the Section 7 rights of employees to
15 communicate where Purple already allows that communication.

16 Dated: June 23, 2015

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

17
18
19 By: /s/ David A. Rosenfeld
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On June 23, 2015, I served the following documents in the manner described below:

☒ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from jwatkinson@unioncounsel.net to the email addresses set forth below.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 23, 2015, at Alameda, California.

/s/ Jennifer Watkinson
Jennifer Watkinson